ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of US West Communications, Inc.	)	**CC Docket No. 97-172**
for a Declaratory Ruling Regarding the	)	
Provision of National Directory Assistance	)	

BELLSOUTH REPLY TO OPPOSITION

BellSouth Corporation, on behalf of BellSouth Telecommunications, Inc. ("BellSouth"), hereby responds to the oppositions[1] to BellSouth's Petition for Limited Reconsideration of the Commission's *NDA Order*[2] in the above-referenced proceeding.

In its Petition, BellSouth showed that the Commission misconstrued Section 271(g)(4) of the Act[3] by reading into it a limitation that is neither evident from the plain language of that section nor required by the "narrow construction" directive of Section 271(h). Specifically, the Commission misread Section 271(g)(4) to require a Bell Operating Company ("BOC") to *own* the information storage facilities that it uses to provide a service permitted under that Section. BellSouth also showed that the consequence of this misconstruction is that BOCs are constrained

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1 Only three parties filed comments in opposition to BellSouth's request: AT&T, MCI WorldCom, and Excell Agent Services ("Excell").

2 *Petition of US West Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, CC Docket No. 97-172, *Memorandum Opinion and Order*, FCC 99-133 (released Sept. 27, 1999) ("*NDA Order*").

3 Communications Act of 1934, as amended, 47 U.S.C. § 151, et seq.

to operate inefficiently to provide services they are otherwise lawfully permitted to provide. Such a consequence inures solely to the benefit of competitors in the incidental interLATA service markets in which a BOC is otherwise permitted to participate and does nothing to promote effective competition in those markets.[4] The Commission's cramped reading of Section 271(g)(4) is thus also inconsistent with the directive to the Commission in Section 271(h) to ensure that competition is not adversely affected by BOCs' provision of services under 271(g). Thus, BellSouth showed that the Commission's interpretation of Section 271(g)(4) should be modified.

DISCUSSION

No party responded to BellSouth's showing that, contrary to the Commission's statement in the *NDA Order*, Section 271(g)(4) does *not* "by its express terms" require a BOC to "own" the information storage facilities utilized in a service that is permitted by that section.[5] Rather, opposing parties[6] merely parroted the Commission's conclusory, but unexplained, assertion that the ownership requirement is "apparent" from Congress' use of the term "such company."[7] As BellSouth's Petition showed, however, the clause "such company" carries absolutely no connotation of ownership.

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[4] Although the Commission's construction of Section 271(g)(4) and much of the commentary on BellSouth's Petition occurred in the context of the application of that section to national directory assistance service, BellSouth is concerned that the Commission's ultra-narrow construction also will introduce unwarranted inefficiencies in incidental interLATA service markets beyond just national directory assistance markets.

[5] BellSouth Petition at 4. Section 271(g)(4) authorizes "the interLATA provision by a [BOC] or its affiliate ... of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA." 47 U.S.C. § 271(g)(4).

[6] *See, e.g.*, Excell at ¶ 23.

[7] *NDA Order* at ¶ 23.

Indeed, by focusing on the phrase "such company," the Commission and opposing parties have overlooked the operative term in the clause "information storage facilities of such company." That operative term is the simple word "of." Thus, the debate is not (or should not be) whether "such company" refers to the BOC, the question is whether the word "of" must be interpreted to mean "owned by." Neither the Commission nor any party has provided the basis for such an interpretation.

Instead, it is clear that "information storage facilities of such company," read in the total context of Section 271(g)(4), does not require that a BOC actually *own* the facilities. Section 271(g)(4) provides the description of a category of services that a BOC may provide prior to Section 271(d) interLATA relief. The essence of that description is the articulation of the *functional* aspects of the permitted service.[8] In the context of this functional service description, "of" is used as a word of identification or relation of the information storage facilities to the service being provided by the BOC. Thus, for purposes of Section 271(g)(4), "of" has the meaning of "associated with" or "utilized by" the BOC (*i.e.*, "such company") providing the service permitted by Section 271(g)(4) and does not have any connotation of ownership.

Indeed, nothing in Section 271(g)(4) suggests that Congress was at all concerned with whether BOCs actually owned the information storage facilities utilized in services offered under that section or had some lesser property or contractual right to utilize those same facilities in precisely the same manner for precisely the same service. Ownership of facilities simply has no bearing on whether a service provided by a BOC conforms to the functional description of

[8] This context differs, for example, from a taxation statute that may impose property taxes on property "of" a company, where ownership of the property is the essence of basis for the tax.

permitted services in Section 271(g)(4). Neither the *NDA Order* nor any opposing party has provided any evidence that Congress intended "of" to mean ownership in this context.

Reliance on the directive of Section 271(h)[9] that Section 271(g) is to be construed narrowly is an insufficient basis upon which to craft the ownership requirement. Although Section 271(h) requires a narrow construction, it does not permit the creation of limitations where none were imposed by Congress. The Commission must still construe "of" reasonably within the context of the functional service description Congress provided. As shown above, nothing in that functional description hinges on whether a BOC owns the information storage facilities used to provide the permitted service.

Nor does the further directive to the Commission in Section 271(h)[10] to consider the effects on competition of BOC provision of services under Section 271(g) require the Commission's limiting construction of Section 271(g)(4). Contrary to the arguments of opposing parties, Section 271(h) does not foreclose the Commission from considering the positive effects on competition from a BOC's provision of services pursuant to Section 271(g)(4). In the *NDA Order*, the Commission expressly rejected the one-sided analysis opponents urge here. There, the Commission stated:

> [I]n view of our finding that U S West's provision of regionwide directory assistance service will *promote competition* in the interLATA directory assistance services market, we conclude that the directive in section 271(h) that the services authorized in section 271(g) "will not adversely affect telephone exchange ratepayers or competition in any telecommunications market" is fulfilled.[11]

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[9] 47 U.S.C. § 271(h) ("provisions of subsection [271](g) are intended to be narrowly construed").

[10] "The Commission shall ensure that the provision of services authorized under subsection (g) by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market." 47 U.S.C. § 271(h).

[11] *NDA Order* at ¶ 25 (emphasis added).

Accordingly, claims by AT&T and others that the Commission cannot consider the pro-competitive effects of BOC provision of incidental interLATA services in its interpretation of Section 271(g)(4) must be rejected.

BellSouth showed in its Petition that the Commission's present interpretation imposes on BOCs artificial costs that are not required for other service providers and that thereby inhibit efficient competition. Other providers are free to engage in commercial transactions that minimize their costs of providing competing services, while BOCs are required to engage in permitted services only through less efficient means. Parties defending this result have provided absolutely no explanation of why Congress would craft a provision that makes a service permissible if a BOC owns the information service facilities but impermissible if the BOC leases or has other commercial or property rights to the very same facilities to provide the very same service. Rather, as indicated above, Congress structured Section 271(g)(4) to turn on the functional aspects of the service in question. Parties favoring the Commission's interpretation thus have placed form over substance and provided no reasoned explanation of why Congress would have intended Section 271(g)(4) to require ownership. Accordingly, their oppositions to BellSouth's Petition should be rejected, and the Commission should modify its interpretation of Section 271(g)(4).

CONCLUSION

For the reasons set forth above and in BellSouth's Petition, the Commission should modify its interpretation of Section 271(g)(4) to not require a BOC to own the information storage facilities it utilizes in providing incidental interLATA services permitted under that section.

Respectfully submitted,
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DATE: December 15, 1999

CERTIFICATE OF SERVICE

I do hereby certify that I have this 15th day of December 1999 served the following parties to this action with a copy of the foregoing BellSouth Reply to Oppositions by hand delivery or by placing a true and correct copy of the same by U.S. mail, addressed to the parties listed on the attached service list.

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